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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN BATEMAN, Plaintiff and Appellant, v. FIRST AFG FINANCIAL CORPORATION, et.al., Defendants and Appellants.	G037723 (Super. Ct. No. 04CC12049) O P I N I O N

Appeal from a judgment and an order of the Superior Court of Orange County, Sheila Fell, Judge. Both judgment and order affirmed.

Law Offices of Sally L. Gersten and Sally L. Gersten for Plaintiff and Appellant.

O'Neil & Matusek and Henry John Matusek II for Defendants and Appellants.

* * *

I. INTRODUCTION

There's a saying in investment strategy and tax law that if something is too good to be true, it is. In the case before us, that "something" was an alleged guaranteed 110 percent return on one's money.

In this appeal, John Bateman asserts that in exchange for lending a mortgage loan broker, First AFG Financial Corporation, $ 475,000 to purchase a lot in San Marcos to be subdivided and developed into homes, First AFG *guaranteed* him not only a 10 percent return, but an *extra* $475,000 to boot. The trial court didn't buy that interpretation of the contract and neither do we. The exact language of the contract was that the extra $475,000 was "only payable at the completion of . . . the project." Such language can only be reasonably interpreted as deeming completion of the project to be a condition precedent to the payment of the extra $475,000, and in this case the project was not completed. Bateman did, we hasten to add, receive his money back *with* the promised 10 percent interest. The trial court correctly determined that he had no valid breach of contract claim.

Bateman also argues on appeal that he was entitled to damages for intentional misrepresentation in regard to discrepancies involving a number of details in the transaction. (For example, First AFG's agent was unlicensed.) The trial court, however, found as a factual matter that he did not *rely* on any of those details in entering into the deal with First AFG. (For example, he didn't *care* that the agent was unlicensed.) Because there is substantial evidence in the record to support the trial court's finding about his lack of reliance, the judgment must also be affirmed in regard to his intentional misrepresentation claims.

Bateman also argues that he should have been allowed to proceed on a breach of fiduciary claim. However, as we show below, that claim in particular was abandoned between the second-to-the-final and the final amended complaints.

However, we reject the cross-appeal of First AFG and related parties for attorney fees. The attorney fee provision at issue, when read in context, is confined to the situation where a borrower defaults on a note, which is not in the least applicable here.

II. FACTS

In 2001, when interest rates were at an average of 6.8 percent,[1] Bateman's banker introduced him to mortgage loan broker, First AFG, who was willing to pay Bateman rates as high as 12 percent for funding its loans to real estate developers. One such loan was to allow developer, Zareen, Inc., to buy a parcel of land in San Marcos to subdivide and build single family houses on the subdivisions. Bateman loaned $475,000 to Zareen and agreed to receive:

(1) 10 percent annual interest on the use of his $475,000;

(2) repayment of his original $475,000 after 9 months from the date the loan contract was executed;[2]

(3) an *additional* $475,000, less interest paid,[3] that was only payable when the subdivision was completed and sold; and

(4) a deed of trust on the property as a security interest.

Once Bateman put up the funds in October 2001, the San Marcos property was bought using Bateman's money and Bateman got a deed of trust. The loan broker, First AFG, immediately started paying Bateman the 10-percent interest on the principal, which was $3,958.33 per month. All seemed fine.

In December 2003, First AFG paid back Bateman's $475,000 principal and acknowledged that it was to pay Bateman his additional $475,000, less interest paid when the subdivision was done and sold.

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[1] This average interest rate from 2001 can be accessed from the website of the U.S. Department of Housing and Urban Development.

[2] The actual duration of the loan was for six months with a one time three month extension.

[3] This additional $475,000 would have doubled Bateman's original $475,000 loan investment. To be precise, the contract provided that if the San Marcos subdivision were ever completed and sold, Bateman would have gotten an additional $475,000 minus whatever interest payments that had been already paid to him on his original $475,000: "The Borrower is to pay the Lender monthly on the First day of each month $3,958.33 which represents an annual return of 10% on the original $475,000.00. The *said payment is a part of the additional $475,000.00* . . . and the said amount is to be deducted from this additional $475,000.00 equal to the number of payments made to the lender." (Italics added.)

According to the quoted term above, had the subdivision been finished, the actual figure Bateman would have received would have been $376,050 because he had already been paid interest payments of $98,950. And the $376,050 figure is what Bateman was actually seeking in this case. But because the interest payments of $98,950 and the balance of $376,050 would have totaled an additional $475,000 -- essentially doubling his money on the original $475,000 invested -- we will refer to what Bateman is seeking as the "additional" or "bonus $475,000" he could have gotten at the completion of the San Marcos subdivision project.

But the subdivision was never finished, and Bateman never saw the additional $475,000. The developer, Zareen, ran into difficulty with the city of San Marcos in starting the project and the project was abandoned. First AFG sold the land in June 2004 for $1.65 million.

Not having doubled his money as expected, Bateman sued both the loan broker, First AFG, and the developer, Zareen, in December 2004. After four amended pleadings, Bateman finally alleged breach of contract, promissory estoppel, fraud and deceit. After a bench trial in late June 2006, a judgment was entered for both First AFG and Zareen. We now affirm.

III. THE CONTRACT

The contract consists of two documents: (a) the Deed of Trust on the San Marcos property and (b) the "Rider to Note and Deed of Trust."

First, the Deed of Trust establishes the relationship between Zareen as both developer of the subdivision project on the San Marcos lot and ultimate borrower of Bateman's money, and First AFG as the lender of Bateman's money on Bateman's behalf and the trustee of the property while the loan was being repaid. The Deed of Trust "secures to [First AFG]: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of [Zareen]'s covenants and agreements under [the Deed of Trust] and the Note. For this purpose, [Zareen] irrevocably grants and conveys to Trustee, in trust, with power of sale, the [San Marcos] property."

The Rider adds "additional terms and conditions described in the Note and Deed of Trust" and lists eight separately numbered paragraphs pertaining to Bateman's end of the deal. For loaning his $475,000, Bateman was to get "a Deed of Trust in favor of the lender First AFG Financial, Inc. . . . for John Bateman and Peggy Lynn Bateman"[4] and he was to be paid "monthly on the First day of each month $3,958.33 which represent

[4] Peggy Lynn Bateman is Bateman's wife. Though she was listed on the Rider, testimony at trial showed that she had no part in the transaction or agreement whatsoever, and has never been a party to this suit.

an annual return of 10% on the original $475,000.00." The term of the loan was "for a period of six months with one three months extension from the initial maturity date."

Paragraphs 3 and 4 of the Rider address the issue of the additional $475,000: "[¶] 3. The borrower agrees to pay . . . an additional $475,000.00 at the completion of the final phase of the project. [¶] 4. *Should* the actual $475,000.00 loan [be] paid at the maturity or the end of extension period the additional $475,000.00 *is only payable at the completion of the project* and with the satisfactory sale of all or enough properties that would satisfy the initial $475,000.00 loan and any [construction] loan acquired toward the development of said project." (Italics added.)

Although paragraph 6 stated that "[t]he Borrower anticipates that the said project is to be fully completed no later than 12 months from the start of the initial loan date," there were no guarantees elsewhere in the Rider saying that the "Borrower" guaranteed what it "anticipated."

IV. DISCUSSION

1. Breach of Contract

Paragraphs 3 and 4 of the Rider address the issue of the additional $475,000. Paragraph 3 states that "borrower agrees to pay the lender an additional $475,000.00 at the completion of the final phase of the project." Meanwhile paragraph 4 sheds light on paragraph 3's "the final phase of the project" by stating that Bateman's "additional $475,000.00 [was] only payable at the completion of the project and with the satisfactory sale of all or enough properties that would satisfy the initial $475,000.00 loan and any [construction] loan acquired toward the development of said project."

The trial court found Bateman would get the bonus $475,000 only if some very specific things were to occur: Bateman would "receive an additional $475,000.00 which amount is '. . . *only payable at the completion of the project and with the satisfactory sale of all or enough properties* that would satisfy the initial $475,000.00 loan.'" (Italics added.)

Essentially paragraphs 3 and 4 conditioned Bateman's double money return on the actual completion and sale of developed properties in the San Marcos project. The court recognized that condition and "so noted" that the condition was never satisfied: "[B]ecause the project was not complete, [the loan broker and developer] do not owe [Bateman] anything."

On appeal now, Bateman argues that the court erred in finding that his bonus of $475,000 was conditional upon the completion of the San Marcos subdivision. He contends that the additional $475,000 was not a conditional promise and that breach occurred when the San Marcos project was abandoned and sold.

It is no big deal that obligations within contracts can be conditioned on contingent events. Section 1434 of the California Civil Code provides that "[a]n obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event."[5] (Civ. Code, § 1434.) Under section 1436, "[a] condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." (§ 1436.)

To be sure, courts are generally reluctant to construe a provision as a condition if forfeiture would result. (See 1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 812, p. 906; Rest.2d. Contracts, § 227(1).) But if the plain language requires such a result, so be it. (See *Larson v. Thoresen* (1953) 116 Cal.App.2d 790, 794 ["Provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such a construction."].)

Paragraph 4 expressly states that Bateman's "additional $475,000.00 is *only payable at* the completion of the project and with the satisfactory sale of all or enough properties that would satisfy the initial $475,000.00 loan and any [construction] loan acquired toward the development of the said project." (Italics added) Paragraph 4's use of "only payable" to tie Bateman's receipt of an additional $475,000 together with the events of subdividing the San Marcos property, building homes in the subdivision, and adequately selling those homes indicates that Bateman's prospects of doubling his money here was merely conditional -- just a possibility. The phrase "only payable" restricts Bateman's ability to double his money only upon (1) the completion of the San Marcos

[5] All subsequent references are to the California Civil Code.

subdivision project and (2) sale of enough of the subdivided parcels that would (3) cover Bateman's initial $475,000 loan and other loans incidental to the subdivision project. And such events were not certain. It was never for certain that the San Marcos property would or could ever be subdivided and sold as planned. The trial court found that Zareen, the developer, and First AFG, the loan broker, "[were] not required to pursue development of the property despite the fact that [they] determined development was not feasible" and that "the contract . . . did not prohibit or restrict [them] from abandoning the project."

At trial, the loan broker's agent mentioned that "we make decisions that at one point . . . we want to pursue it and at one point we decide it's not cost effective and it's not feasible to move forward with it, and those decisions are based on business decisions."

And in fact that is what occurred. By the time Bateman had been paid back the original $475,000 he loaned, plus 10 percent interest payments in 2003, the developer and loan broker had run into "red tape" with the city of San Marcos in filing a new map for the subdivision project and found such delays hindered the feasibility and profitability of the project. Such facts show that the commercial reality of the transaction was that the subdivision project was never a sure bet, and thus correspondingly show that the additional $475,000 would most reasonably be construed as a bonus in light of the risk.

Of course, human beings often have a sense of loss when some windfall that they thought was coming their way does not arrive, so it is not surprising that Bateman argues that construing paragraph 4 as a condition results in a *forfeiture*. But that is using the word "forfeiture" in an off beat and unreasonable sense, a kind of game show idea of forfeiture in which a contestant spins a wheel that *might* result in big winnings, the wheel simply doesn't land on the right spot, and the imaginary winnings vanish. This case involves no forfeiture in traditional sense of the word of actually losing something one already has: Bateman did, after all, get his original $475,000 back with much higher interest than more conservative investments were paying. Moreover, as we have noted above, it is not commercially reasonable to construe Paragraphs 3 and 4 as anything *but* a condition, since that would mean First AFG was, in effect, offering to pay 110 percent interest. Only loan sharks have any expectations of receiving that sort of return on their money.

Bateman also argues on appeal that the contract was modified when the loan broker's agent sent him a letter dated December 17, 2003. This letter was a confirmation that Bateman had been repaid in full the *original* $475,000 he had lent. He argues that the agent's letter was more than a confirmation. He contends that its language *modified* the loan contract so that any ambiguities regarding paragraph 4 of the Rider would now be changed to mean that the additional $475,000 was not subject to a condition (in case it ever did) but rather it was definitely owed to Bateman as a promise.

Under subdivision (a) of section 1698 of the Civil Code, "[a] contract in writing may be modified by a contract in writing." (§ 1698, subd. (a).) Though the agent's letter does acknowledge changes the parties had made since the Rider's execution, the changes only pertain to extending the duration of the loan, which had originally been six months from the execution of the Rider in October 2001 with a permitted three month extension, but as testimony showed, Bateman was more than happy on numerous occasions to extend the loan period all the way to December 2003. Otherwise the rest of the letter was consistent with the Rider by restating what Bateman actually bargained for: "Based on the original agreement you were to be paid $475,000.00 at the completion of the project . . . . Of the said $475,000.00 you were to be paid 10% annually." The letter referenced the deed of trust by stating that Bateman's loan was "secured by the above referenced property" and that it was "still on record at the County Recorder Office in San Diego County."

What the letter does not state is either an unconditional promise to complete the San Marcos project or a promise to pay $475,000 in any event. Instead, it reiterates paragraph 3 and 4 of the Rider by mentioning that Bateman's additional $475,000 "will be paid at the completion of the project." That statement does not forecast a date of completion nor *conclusively promise* that the San Marcos project will ever be done -- it doesn't use "we promise" or other express language warranting the subdivision's completion. Rather, the sentence is passively phrased and is unclear about a definite completion. In light of paragraphs 3 and 4, the sentence simply reiterates the obligation to pay Bateman his bonus $475,000 if the subdivisions were finished and sold.

2. Fraud and Reliance

a. *Substantial Evidence of No Reliance on Certain Implied Promises*

The trial court rejected Bateman's fraud claims, finding that he did not *rely* on any of the representations about the deal going in and the way things turned out.[6] Not only was substantial evidence of an *absence* of reliance as to these representations, but Bateman's own list of citations to the reporter's transcript "showing reliance" do not reflect any reliance on these particular representations. Accordingly, there is no basis for this court to reverse the judgment.

First, we deal with a map of the project shown to Bateman, which he now asserts somehow locked First AFG into dividing the San Marcos project into 17 parcels. In his own deposition, however, read into the record by opposing counsel at trial, Bateman admitted that no such promise was made to him because First AFG "had no reason to say that."

Next, there was the promise that the developer, Zareen, would be the borrower on the Rider with Bateman as the actual lender. (As it turned out, Zareen was an empty Nevada corporation created by First AFG itself. In essence, Bateman was simply lending money to First AFG.) As to this promise, there was evidence that in

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[6] On appeal, Bateman claims he was told that:

(a) the only map of the project shown to him, dividing the San Marcos property to 17 parcels, was to be the map used to proceed on the project;

(b) the developer, Zareen, Inc., would be borrower on the Rider while Bateman was the lender;

(c) Bateman would receive a secured interest on a deed of trust to the San Marcos property;

(d) Mr. Naim Ismail, the loan broker's agent, with whom Bateman specifically dealt, was licensed to make real estate deals; and

(e) the borrower on the loan was to be changed to be loan broker, First AFG, and not the developer, Zareen, Inc.

Here's what actually happened, given the evidence as believed by the trial court: Unbeknownst to Bateman, the 17 parcel subdivision map had already expired when he saw it. The project was really going to be subdivided into 24 parcels. First AFG never lent the money to Zareen but used Bateman's money to buy the property on its own. Bateman received a deed of trust to the San Marcos property but it did not contain his name and it was recorded with First AFG as trustee. First AFG's agent turned out not to have a real estate license at all. And First AFG never changed the loan contract to reflect First AFG as the true borrowers.

previous deals Bateman never seemed to know for sure, or *care*, to whom the broker was loaning out his money. And when Bateman was told that First AFG was "just lending the money to Zareen, a Nevada corporation that was developing the property," he never asked First AFG about the developer, Zareen. In fact, Bateman only checked into the developer's status in hindsight "because of this lawsuit." And when asked, if it was "[his] understanding that the property would be recorded in the name of First AFG Financial," he said yes and then shortly admitted he "didn't have a problem with that."

Then there was the promise that Bateman himself would receive a secured interest on a deed of trust securing the San Marcos property. However, when Bateman received the Rider, the deed of trust was attached to it and the document listed First AFG, the loan broker, as the lender on Bateman's behalf and as trustee on the deed. The deed also mentioned a promissory note that was to be "signed by Borrower" and the deed stated that "Borrower owes Lender FOURHUNDRED SEVENTY FIVE THOUSAND AND 00/100 . . . plus interest" but the trial court found there was no promissory note. The absence of a note, plus the possibility of doubled money at the end of the project as adumbrated in paragraphs 3 and 4 of the Rider, paints a picture from which the trial court could reasonably infer that Bateman did *not* intend to assume the role (and risks) of being the lender to the developer on the project complete with the option of taking back the property if the developer defaulted on a (non-existent) note, but of *investor* in a project organized by First AFG, with First AFG assuming the risks of having an actual interest in the underlying property. Additionally, Bateman never mentioned that a deed secured in his name was ever part of his reliance in entering into the deal. He only testified that *when* he received his copy of the loan agreement and deed of trust, he thought he now had a "security in the property." Further, Bateman admitted that he was not familiar with deeds and didn't seem to know specifically what he got when such deeds were given to him in other situations where he had lent money through First AFG -- again indicating that he didn't care about ownership in the underlying property (as long as he got his 10 percent interest and the possibility of doubling his money).

There was also the fact that Bateman dealt with an agent, Naim Ismail, who was unlicensed. On this point Bateman testified that he felt confident in dealing with Ismail because of Ismail's status as a "a duty officer of a corporation," who "had 26 years of experience." Never during his testimony did Bateman affirmatively indicate that he assumed the agent was licensed.

Finally, there was the fact that (as we have noted above), the developer, Zareen, turned out be an incarnation of First AFG itself. Here, the salient point is that in all the time he was dealing with Ismail, Bateman never inquired about Zareen. He cared about his return from First AFG, not how that return was generated.

b. *A Paucity of Conflicting Evidence*

After oral argument, Bateman's counsel submitted to this court a list of references in the reporter's transcript which supposedly showed "reliance." All the testimony involved comes exclusively from Bateman himself.

We will leave aside the issue of whether such an effort is procedurally proper (it amounts to redoing one's appellant's opening brief without giving the opposition a chance to comment on the references in their respondent's brief). We will also note that, on appeal, we must credit the facts as found by the trial judge, so conflicting evidence of reliance will not trump the substantial evidence (see above) of no reliance.

Even with all that, the list shows no reliance on any of the discrepancies which have been raised in this appeal. The references merely establish: Bateman gave a check for $475,000 to First AFG; he got a deed of trust as part of the deal; the Rider contained the contract with First AFG; he got a grant deed which he thought represented security in the property; First AFG was ready to develop the property; Bateman got a letter from First AFG that didn't say it would return all of his money; he had a conversation with Ismail that his secured interest in the property would continue to be protected; he never talked to anyone at Zareen; he depended on Naim Ismail to look after his investment and to make sure the promises he received were taken care of; Naim Ismail told him that the project was going to take place; he *relied on the Rider in entering* *the deal* and he read the contract and gave First AFG a check. None of this shows that Bateman cared about the actual map involved, the identity of the eventual developer, actually owning part of the property or the licensed status of the agent he was dealing with.

3. Breach of Fiduciary Duty

Finally, in this appeal, Bateman argues that the loan broker, First AFG, and the developer, Zareen, breached a fiduciary duty to him in making the loan transaction.

Originally, along with his other claims, Bateman had asserted breach of fiduciary duty in his third amended complaint filed on December 10, 2004. First AFG and Zareen demurred to all of Bateman's claims in that complaint. The trial court sustained the demurrer but gave Bateman leave to amend his entire complaint. Bateman did amend, but he *omitted* the breach of fiduciary claim in his fourth and final amended complaint. But now on appeal, he asks us to review whether the trial court erred when it sustained that demurrer. The key point is: He was given leave to amend and he didn't use it.

The pleadings in a plaintiff's complaint frame and limit the issues of the case. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211; see 4 Witkin, Cal. Procedure (4th ed. 1997) Pleadings, § 1, p. 62.) "An order sustaining a demurrer with leave to amend [a complaint] is not a final judgment and therefore not itself appealable. [Citations.] If a plaintiff fails or refuses to amend the complaint, the court will enter a judgment of dismissal from which an appeal to review the correctness of the ruling on the demurrer may be taken." (*Otworth v. Southern Pac Transportation Co.* (1985) 166 Cal.App.3d 452, 457.) But, where plaintiff *does* amend his pleading, such "'an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading' [Citations.]" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884.) Accordingly, "'[s]uch amended pleading supplants all prior complaints. It alone will be considered by the reviewing court.' [Citations.]" (*Ibid.*)

When the trial court sustained the demurrer made against Bateman's third amended complaint, it gave Bateman "20 days leave to amend." Bateman didn't fail or refuse to amend his complaint, but instead he filed a fourth amended complaint on November 4, 2005 that *didn't include* an amended breach of fiduciary claim. By not including the claim, Bateman waived any rights to have that claim or the trial court's order reviewed on appeal.[7]

4. The Cross-Appeal

First AFG and related parties brought a motion for attorney fees, which was denied. They have taken a cross-appeal from the order of denial.

We affirm that order. The basis for the attorney fee motion was attorney fee language in the deed of trust, even though Bateman did not sign the document. In any event, the actual language in the deed of trust is *not* the broad "anything that arises out of this agreement" sort of language that will support an attorney fee award in the event of any litigation between parties. (Cf. *Santisas v. Goodwin* (1998) 17 Cal.4th 599, 603 ["'In the event legal action is instituted by . . . any party to this agreement, or arising out of the execution of this agreement or the sale . . . the prevailing party shall be entitled . . . ."].) Rather, the language in the trust deed in this case ineluctably is confined to the specific context of lender's remedies in the wake of a default of the loan evidenced by the note.[8] Such a context is wholly inapplicable to the case at hand.

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[7] We should add, though, that a breach of fiduciary duty claim would be problematic, even if asserted. The list of discrepancies, as we have just noted, did not go to the underlying *inducement* for the deal. That leaves only First AFG's unilateral decision to abandon the project in the face of municipal red tape as even a colorable basis for a breach of fiduciary duty claim, but that decision appears, at least on its face, to have been a prudent business decision rather than a breach of fiduciary duty. After all, continuing to hold the property while at the same time being stymied in developing it would have created cash flow problems that might have jeopardized what Bateman *was* guaranteed, namely a 10 percent return.

[8] The language relied on by the First AFG parties is in paragraph 22 of the deed of trust, and the attorney fee language appears in a sentence that comes after a swath of text which addresses what happens when the borrower defaults. To put the attorney fee language into context, we also quote the sentence that comes immediately before: "If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs."

V. CONCLUSION AND DISPOSITIONS

The judgment is affirmed. The order denying attorney fees to the First AFG parties is also affirmed. In the interests of justice, each side will bear its costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

ARONSON, J.